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Counsel for the Reorganized Debtors

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA
 SOUTHERN DIVISION**

IN RE:	§	Case No. 09-14814-LBR
	§	(Jointly Administered)
THE RHODES COMPANIES, LLC,	§	
aka "Rhodes Homes," et al.,	§	Chapter 11
	§	
Reorganized Debtors.¹	§	
	§	
	§	
	§	

¹The Reorganized Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: Heritage Land Company, LLC (2918); The Rhodes Companies, LLC (3060); Rhodes Ranch General Partnership (1760); Tick, LP (0707); Glynda, LP (5569); Chalkline, LP (0281); Batcave, LP (6837); Jackknife, LP (6189); Wallboard, LP (1467); Overflow, LP (9349); Rhodes Ranch Golf and Country Club (9730); Tuscany Acquisitions, LLC (0206); Tuscany Acquisitions II, LLC (8693); Tuscany Acquisitions III, LLC (9777); Tuscany Acquisitions IV, LLC (0509); Parcel 20 LLC (5534); Rhodes Design and Development Corp. (1963); C&J Holdings, Inc. (1315); Rhodes Realty, Inc. (0716); Jarupa LLC (4090); Elkhorn Investments, Inc. (6673); Rhodes Homes Arizona, LLC (7248); Rhodes Arizona Properties, LLC (8738); Tribes Holdings LLC (4347); Six Feathers Holdings, LLC (8451); Elkhorn Partners, A Nevada Limited Partnership (9654); Bravo Inc. (2642); Gung-Ho Concrete, LLC (6966); Geronimo Plumbing, LLC (6897); Apache Framing, LLC (6352); Tuscany Golf Country Club, LLC (7132); Pinnacle Grading, LLC (4838).

Affects:

- ☒ **All Debtors**
☐ **Affects the following Debtor(s)**

§ **DECLARATION OF DON A. BOETTCHER**
 § **IN SUPPORT OF MOTION OF THE**
 § **REORGANIZED DEBTORS FOR ENTRY**
 § **OF AN ORDER ENFORCING THE TERMS**
 § **OF THE THIRD AMENDED MODIFIED**
 § **PLAN OF REORGANIZATION PURSUANT**
 § **TO CHAPTER 11 OF THE BANKRUPTCY**
 § **CODE FOR THE RHODES COMPANIES,**
 § **LLC, ET AL. AND THE RELATED**
 § **CONFIRMATION ORDER**

I, Don A. Boettcher, hereby declare:

1. I am currently an authorized agent for and on behalf of Rhodes Design and Development Corporation, a Nevada corporation, and its affiliated companies (collectively, “RDDC”). I have acted in this capacity since April 1, 2010. As part of my responsibilities and duties, I manage and oversee all of the business operations of RDDC (including, but not limited to, those pertaining to the Tuscany Project (as defined below)).

2. I make this declaration in support of the Motion (the “Motion”) of the Reorganized Debtors for Entry of an Order Enforcing the Terms of the Third Amended Modified Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for the Rhodes Companies, LLC, et al. and the Related Confirmation Order. Unless otherwise stated, I have personal knowledge of each of the matters set forth in this Declaration.

Background

A. The Tuscany Purchase Agreement

3. It is my understanding that, prior to the commencement of the Chapter 11 Cases (as defined in the Motion), RDDC, a Debtor in the Chapter 11 Cases and now a Reorganized Debtor, and Commerce Associates, LLC (“Commerce”), entered into that certain Purchase Agreement and Grant of Options dated November 14, 2003 (as amended

1 from time to time, the “Tuscany Purchase Agreement”). A copy of the Tuscany Purchase
2 Agreement is attached hereto as Exhibit A.

3 4. Pursuant to the Tuscany Purchase Agreement, Commerce granted to RDDC
4 the right and option to purchase all of the Property (as defined in the Tuscany Purchase
5 Agreement), which consisted of (i) all of the residential, single-family lots contained (or
6 otherwise contemplated) within the Tuscany Project (as defined below), and (ii) all of the
7 multi-family parcels contained within the Tuscany Project. The term “Tuscany Project”, as
8 used herein, means that certain master planned community located in the City of Henderson,
9 Nevada, which is known as “Tuscany Village”.
10

11 5. Prior to the commencement of the Chapter 11 Cases and in accordance with
12 the terms and provisions of the Tuscany Purchase Agreement, RDDC and/or its affiliated
13 entities acquired certain portions of the Property. In addition, pursuant to a separate
14 agreement between Tuscany Golf Country Club, LLC (an affiliate of RDDC), as the buyer,
15 and Commerce, as the seller, Tuscany Golf Country Club, LLC acquired title and currently
16 owns and operates an 18-hole golf course and related improvements within the Tuscany
17 Project (the “Tuscany Golf Course”). All of the lots and property located within the
18 Tuscany Project (including the Tuscany Golf Course) previously acquired by RDDC and/or
19 any of its affiliates are hereinafter referred to collectively as the “RDDC Property”.
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21 6. As of the Petition Date, the Debtors had the option to purchase, and
22 Commerce had the obligation to sell to the Debtors, certain additional Property pursuant to
23 the terms of the Tuscany Purchase Agreement. The additional Property included (i)
24 approximately 25 lots located within Parcel 6A of the Tuscany Project, (ii) approximately 18
25 finished lots contained within Parcel 17 of the Tuscany Project, and (iii) all of Parcels 5 and
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1 22 of the Tuscan Project.

2 **B. The Master CC&Rs**

3 7. It is my understanding that, in connection with RDDC's development and
4 operation of the RDDC Property, RDDC prepared, executed and recorded that certain
5 Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements
6 for Tuscan Residential Community dated July 26, 2005, and recorded on July 28, 2005 in
7 Book 20050728, Instrument No. 0004296, of the Official Records of Clark County, Nevada
8 (the "Master CC&Rs"). Commerce consented to the recordation of the Master CC&Rs, as
9 evidenced by its execution of the "Consent of Master Developer" attached thereto. Pursuant
10 to the Master CC&Rs, Tuscan Master Association, a Nevada non-profit corporation (the
11 "Master Association"), was formed by RDDC to, among other things, own, operate and
12 maintain the common elements within the Tuscan Project for and on behalf of the
13 homeowners and other property owners, enforce the Master CC&Rs and other Governing
14 Documents (as defined in the Master CC&Rs) and perform the other duties and
15 responsibilities of the Master Association under the Master CC&Rs and other Governing
16 Documents.
17

18 8. RDDC is the "Declarant" under the Master CC&Rs and holds all of the
19 rights, privileges and benefits of the Declarant under the Master CC&Rs (collectively, the
20 "Declarant Rights"), which rights include, but are not limited to, the right to appoint
21 members of the board of directors and officers of the Master Association, the right to
22 appoint members of the Design and Review Committee of the Association, the right enforce
23 the CC&Rs and the covenants and restrictions contained therein, the right to review certain
24 plans and specifications of homeowners and other developers and builders, the right to
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1 construct and sell homes and other improvements within the Tuscany Project, the right to
2 construct, maintain and operate models, construction offices and sales offices within the
3 Tuscany Project, the right to annex and add property to the Master CC&Rs and Master
4 Association, and the right to exercise various other “developmental rights” and “special
5 declarant rights” (as those terms are defined in N.R.S. Chapter 116).
6

7 9. It is my understanding that, since the Master CC&Rs were originally
8 recorded in 2005, RDDC has exercised and performed (and continues to exercise and
9 perform) all of the rights, duties, obligations and responsibilities of the Declarant under the
10 Master CC&Rs. These rights, duties, obligations and responsibilities include, without
11 limitation, appointing the board members and the officers of the Master Association,
12 annexing property to the Master CC&Rs, maintaining and operating the common elements
13 and other amenities (including the gated entryways and recreation center) of the Master
14 Association, preparing and maintaining the budgets of the Master Association and
15 subsidizing shortfalls in such budgets.
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18 10. RDDC continues to own numerous residential lots within the Tuscany Project
19 and is actively developing, marketing and selling homes and other related improvements
20 thereon. In addition, RDDC’s affiliate, Tuscany Golf Country Club, LLC, still owns and
21 operates the Tuscany Golf Course. The Declarant Rights held by RDDC are an integral part
22 of (i) RDDC’s ability to protect its assets and to develop, market and sell homes on its lots,
23 and (ii) Tuscany Golf Country Club, LLC’s maintenance and operation of the Tuscany Golf
24 Course. These Declarant Rights are also critical to RDDC’s ability to protect and maintain
25 the aesthetic, recreational and other qualities of the Tuscany Project as a whole.
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1 **C. The Conditional Assignment**

2 11. It is my understanding that, as required under Section 10.2 of the Tuscany
 3 Purchase Agreement, a copy of that certain Conditional Assignment and Grant of Rights by
 4 RDDC in favor of Commerce was recorded on December 19, 2005, in Book 20051219,
 5 Instrument No. 0004171, of the Official Records of Clark County, Nevada (the “Conditional
 6 Assignment”) at the closing of the Phase I Lots (as defined in the Tuscany Purchase
 7 Agreement) under the Tuscany Purchase Agreement. The Conditional Assignment was
 8 integrally related to the transactions contemplated by the Tuscany Purchase Agreement. In
 9 fact, as an ancillary agreement, the form of the Conditional Assignment was attached as an
 10 exhibit to Tuscany Purchase Agreement. A copy of the Conditional Assignment is attached
 11 hereto as Exhibit B.
 12

13 12. Pursuant to the Conditional Assignment, RDDC purportedly assigned and
 14 granted a security interest to Commerce in and to the Declarant Rights under the Master
 15 CC&Rs, as additional security for RDDC’s performance of its obligations to purchase all of
 16 the Property under the Tuscany Purchase Agreement. The Conditional Assignment
 17 expressly provided that “subject to Commerce’s rights to accept, reject, or limit the transfer
 18 of same, [RDDC] hereby grants, assigns, and sets over to Commerce, and **grants a security**
 19 **interest in**, all of [RDDC’s] right and interest in and to [RDDC’s] rights as Declarant in and
 20 under the Master Declaration” The Conditional Assignment was also expressly
 21 conditioned upon and effective only upon the occurrence of a Termination Event (as defined
 22 in the Conditional Assignment).
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26 13. In addition, the Conditional Assignment was not a self-effectuating
 27 document. Both the Conditional Assignment and the Tuscany Purchase Agreement
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1 expressly provided that, in the event of the occurrence of a Termination Event, Commerce
2 shall have the right, but not the obligation, to become the Declarant under the Master
3 CC&Rs.

4
5 14. To my knowledge and belief, Commerce has never (whether before or after
6 the commencement of the Chapter 11 Cases) exercised any right or otherwise assumed any
7 obligation to become the Declarant under the Master CC&Rs.

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9 15. To my knowledge and belief, since the Master CC&Rs were originally
10 recorded in 2005, RDDC has been the sole Declarant under the Master CC&Rs and has
11 continuously exercised and performed all of the rights and obligations of the Declarant
12 thereunder.

13 **D. The Chapter 11 Cases**

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15 16. To my knowledge and belief, the Chapter 11 Cases were filed prior to
16 RDDC's acquisition of all of the Property under the Tuscany Purchase Agreement, and
17 Commerce still owns the portion of the Property not acquired by RDDC.

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19 17. To my knowledge and belief, both the Tuscany Purchase Agreement and the
20 Conditional Assignment were rejected (or deemed rejected) and otherwise terminated in
21 connection with the Chapter 11 Cases. The Master CC&Rs, on the other hand, were
22 expressly listed in the Assumption Schedule as an assumed contract.

23 **E. Letter from Commerce's Counsel**

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25 18. On or about November 21, 2012, RDDC's affiliate, Las Vegas Land
26 Holdings, LLC, received a letter from Commerce's attorney, Stephen M. Rice at Rice Silbey
27 Reuther & Sullivan, LLP (the "Commerce Letter"), which asserts, among other things, that
28 "Commerce has retained the right to exercise and assign declarant rights under the existing

1 [Master CC&Rs] now of record with respect to the Tuscan master planned community
2 pursuant to [the Conditional Assignment]” A copy of the foregoing Commerce Letter
3 is attached hereto as Exhibit C. To my knowledge and belief, this is the first time that
4 Commerce has ever asserted any claim with respect to the Declarant Rights.
5

6 **F. Letter from Lennar’s Counsel**

7 19. On or about November 29, 2012, Las Vegas Land Holdings, LLC, also
8 received a letter from Dean S. Bennett at Cotton, Driggs, Walch, Holley, Woloson &
9 Thompson, who apparently represents Lennar Corporation and/or its affiliates (collectively,
10 “Lennar”) in connection with a purchase and sale transaction between Commerce and
11 Lennar with respect to the remaining residential property located within the Tuscan Project
12 still owned by Commerce. A copy of the foregoing letter from Dean S. Bennett (the
13 “Lennar Letter”) is attached hereto as Exhibit D. In the Lennar Letter, Lennar asserts,
14 among other things, that “Commerce has the present right and ability to take exclusive
15 control of the [D]eclarant [R]ights and development rights” pursuant to the Conditional
16 Assignment and to further assign those rights to Lennar in connection with the purchase and
17 sale transaction between Lennar and Commerce. Based on the Lennar Letter, it appears that
18 Lennar intends to attempt to take over and exercise the Declarant Rights under the Master
19 CC&Rs in violation of RDDC’s rights.
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 day of November, 2012.

By: 
Don A. Boettcher

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